In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1386

STASIA V. HAYMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. B. 1)[1] has not yet been reported. The memorandum opinion of the Tax Court (Pet. App. A. 1 - A. 9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1969 (Pet. App. B. 1). The petition for a writ of certiorari was filed on May 12, 1969. The jurisdiction for this Court is invoked under 28 U.S.C. 1254(1).

[1] The symbol "Pet. App." refers to the appendix to petitioner's petition filed in this Court.

QUESTION PRESENTED

Whether Sections 172(d)(3) and 172(d)(4) of the Internal Revenue Code of 1954, which prohibit deductions for personal exemptions and nonbusiness deductions in computing losses that may be carried back or carried over to other taxable years, are constitutional.

STATUTES AND OTHER AUTHORITIES INVOLVED

Section 172 of the Internal Revenue Code of 1954 is set forth in the Appendix, *infra*, pp. 7-8.

STATEMENT

Petitioner, on April 11, 1965, filed with the Commissioner of Internal Revenue an "Application for Tentative Carryback Adjustment" (Ex. 2 B to Stip.),[2] claiming a reduction in her 1961 federal income tax of $285.43 (Ex. 2 B to Stip., p. 1) on the ground that her income tax return for 1964 disclosed that she had had a net loss of $1,312.93. Petitioner arrived at this figure by deducting the following amounts from the $2,819 in wages she received as a secretary during 1964: a $85.54 loss from the operation of rental property; a $3,235.43 loss upon the sale of that property; and itemized nonbusiness deductions of $810.96 (Pet. App. A. 2).

In accordance with his established practice and prior to audit, the Commissioner mailed to her the requested refund of $285.43. Then, on January 13,

[2] The exhibits were separately bound, and filed in the court below as part of the record.

1966, petitioner by letter claimed an additional deduction increasing her "net loss" by the amount of a personal exemption of $600, which she had failed to claim on her 1964 return (Pet. App. A. 3).

Upon audit, the Commissioner limited the net operating loss carryback deduction to $501.97, thus determining that neither the itemized nonbusiness deductions nor the personal exemption could be used to enhance the net operating loss carryback deduction allowed under Section 172 of the 1954 Code. (Ex. A to Pet., pp. 1-2). The result was an income tax deficiency against petitioner in the amount of $171.63 (Pet. App. A. 3). Upon a petition for a redetermination, the Tax Court sustained the Commissioner's determination and the Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. B. 1).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or any other ground for further review.

1. Sections 172(a) and 172(b) of the Internal Revenue Code of 1954 allow a three year carryback of a taxpayer's "net operating loss." Section 172(c) defines the net operating loss as "the excess of the deductions allowed by this chapter over the gross income * * * with the modifications specified in subsection (d)." Two of the modifications of Section 172(d) apply here. They are Sections 172(d)(3) and 172(d)(4):

(3) *Deduction for personal exemptions.*—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) *Nonbusiness deductions of taxpayers other than corporations.*—In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence—

(A) any gain or loss from the sale or other disposition of—

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business, shall be treated as attributable to the trade or business;

* * * *

Thus the statute expressly required the Commissioner and the courts to rule that petitioner's $600 personal exemption and her nonbusiness itemized deductions of $810.96 could not be used to enhance the amount of the carryback.

2. There is no merit to petitioner's attack on the constitutionality of Sections 172(d)(3) and (4). Of course, unconstitutionality of the $600 exemption could hardly be a reason for allowing petitioner to claim it to enlarge her carryback. In no event does

the exemption violate any constitutional provisions. *Crowe* v. *Commissioner*, 396 F.2d 766, 767 (C.A. 8); cf. *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1. The purpose and effect of Section 172(d)(4)—to limit loss carrybacks and carryovers to business losses[3]—is well within the legislative power. *See United States* v. *Olympic Radio and Television*, 349 U.S. 232, 235-236.

3. Section 172(d)(4) expressly provides that "real property used in the trade or business, shall be treated as attributable to the trade or business" in arriving at a net operating loss carryback. Thus the courts below properly rejected petitioner's contention that the loss on the sale of her rental property should not be treated as attributable to her trade or business.[4] Even if there were any merit to petitioner's contention that her loss from the sale of the rental property is to be treated as a capital loss, it would not affect the year in issue here and such issue was not raised in the pleadings filed in the Tax Court.[5]

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[3] See S. Rep. No. 1622, 83d Cong., 2d Sess. 31-32, 211-213.

[4] See *Alvary* v. *United States*, 302 F. 2d 790, 796 (C.A. 2); *Reiner* v. *United States*, 222 F.2d 770, 772-773 (C.A. 7).

[5] Nor is there merit to petitioner's contention that her wages are not to be treated as income attributed to her trade or business in arriving at her operating loss carryback. See Section 1.172-3(a)(3) of Treasury Regulations on Income Tax (1954 Code); *Folker* v. *Johnson*, 230 F.2d 906, 907 (C.A. 2); *Overly* v. *Commissioner*, 243 F.2d 576 (C.A. 3); *Batzell* v. *Commissioner*, 266 F.2d 371, 372 (C.A. 4); *Roberts* v. *Commissioner*, 258 F.2d 634, 636-637, 640 (C.A. 5); *Pierce* v. *Commissioner*, 254 F.2d 885, 887-888 (C.A. 9); *Weinstein* v. *Commissioner*, 29 T.C. 142, 146; *Swisher* v. *Commissioner*, 33 T.C. 506, 509.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1969.

APPENDIX

Internal Revenue Code of 1954:

SEC. 172. NET OPERATING LOSS DEDUCTION.

(a) *Deduction Allowed.*—There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) [as amended by Sec. 317(b), Trade Expansion Act of 1962, P. L. 87-794, 76 Stat. 872, 889] *Net Operating Loss Carrybacks and Carryovers.*—

(1) *Years to which loss may be carried.*—

(A) (i) Except as provided in clause (ii), a net operating loss for any taxable year ending after December 31, 1957, shall be a net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss.

* * * *

(c) *Net Operating Loss Defined.*—For purposes of this section, the term "net operating loss" means (for any taxable year ending after December 31, 1953) the excess of the deductions allowed by this chapter over the gross income. Such excess shall be computed with the modifications specified in subsection (d).

(d) *Modifications.*—The modifications referred to in this section are as follows:

* * * *

(3) *Deduction for personal exemptions.*—No deduction shall be allowed under section 151 (relating to personal exemptions). No deduction in lieu of any such deduction shall be allowed.

(4) *Nonbusiness deductions of taxpayers other than corporations.*—In the case of a taxpayer other than a corporation, the deductions allowable by this chapter which are not attributable to a taxpayer's trade or business shall be allowed only to the extent of the amount of the gross income not derived from such trade or business. For purposes of the preceding sentence—

(A) any gain or loss from the sale or other disposition of—

(i) property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or

(ii) real property used in the trade or business, shall be treated as attributable to the trade or business;

* * * *

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